Supreme Court, U.S.
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No. 88-977

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

COLORADO-UTE ELECTRIC ASSOCIATION, INC., *et al.*,
Appellants,

v.

THE PUBLIC UTILITIES COMMISSION OF
THE STATE OF COLORADO, *et al.*,
Appellees.

On Appeal from the Supreme Court of Colorado

BRIEF OPPOSING MOTION TO DISMISS OR AFFIRM

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LEGAL ARGUMENT

I.

IT WOULD HAVE BEEN ILLOGICAL FOR COLORADO-UTE AND THE MEMBERS TO HAVE APPEALED THEIR OWN WIN.

Despite the fact that Colorado-Ute and the Members prevailed at the district court level, the appellees insist that, in order to preserve their federal issues in this Court, Colorado-Ute and the Members should have appealed their win to the Colorado Supreme Court. They may have couched this as an argument that the federal issues were not properly raised; what it boils down to, however, is that they contend appellants should have appealed their own win.

When they argue, for example, that this appeal should be dismissed because the federal issues were not passed on below, when they enumerate the various avenues available to Colorado-Ute and the Members to raise the federal issues in the Colorado Supreme Court, and when they contend that the Colorado Supreme Court will not entertain issues raised for the first time on petition for rehearing, what they are actually asserting is that Colorado-Ute and the Members should have appealed their own win.

What has completely escaped the appellees throughout their argument is the impracticality of appealing a win. It is undisputed that the district court ruled that the PUC's decision was erroneous and that Colorado-Ute was not required to implement the PUC-ordered rate.[1] A cross-appeal would have required attacking the favorable decision of the district court.

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[1] See Appendix to Jurisdictional Statement, A-86.

Even raising the federal issues in the answer brief would have had tactical drawbacks by requiring Colorado-Ute and the Members to devote a part of their briefs on appeal to issues not responsive to the issues raised by the opposing parties. Given the space limitations imposed by the Colorado Supreme Court, raising issues that were not part of the lower court's decision may have ultimately hampered Colorado-Ute's argument. In any event, either approach would have clearly created a substantive disadvantage for Colorado-Ute and the Members in defending the appeal.

Finally, the rule pushed by appellees would force litigants at every stage of the appellate proceedings to reiterate each and every argument they might have concerning a federal issue in order to properly preserve it. Such a requirement unduly burdens the appellate courts and the parties and frustrates judicial economy.

Under circumstances such as these, where: (1) the federal issues are properly raised before the agency and the trial court below; (2) the appellant prevails at the trial court; (3) to raise the federal issues before the appellate court would be tantamount to appealing a win; and (4) the appellant raises the issues in the state court by way of a timely petition for rehearing which is subsequently denied, this Court should not, as a matter of policy, preclude consideration of a bona fide issue on the basis that the issue was not properly preserved. Applying this standard to Colorado-Ute and the Members, it is clear that to reject the appeal on this basis would unfairly penalize Colorado-Ute and the Members for pursuing a commonsense legal strategy.

II.

APPELLEES HAVE ATTEMPTED TO OBSCURE THE TRUE ISSUE RELATING TO THE COMMERCE AND SUPREMACY CLAUSES.

The issue here is not, as suggested by the appellees, whether the REA has actually attempted in this case to preempt the PUC's actions in ordering the demand-energy rate. The issue is rather, whether the PUC's order exceeds the permissible bounds of regulation of rural electric cooperatives operating in interstate commerce. Colorado-Ute and the Members pointed out, however, that in order for this Court to decide the propriety of the PUC order, this Court needed to reexamine and refine its opinion in *Ark. Elec. Coop. v. Ark. Pub. Serv. Comm'n.*, 461 U.S. 375 (1983) in light of the facts of this case and the changes that have taken place since that decision.

Appellees are, therefore, attacking a position that Colorado-Ute and the Members clearly did not take. Whether or not the REA has chosen to intervene in this particular case is not conclusive with respect to the limits on state regulation of rural electric cooperatives in interstate commerce imposed by the Commerce and Supremacy clauses.

In *Arkansas Electric*, this Court indicated that its decision there might change if the REA altered its policy regarding the level of its involvement with rural electric cooperatives or if a specific rate imposed by a state regulatory body would seriously impair the ability of the cooperative to meet its federal obligations.

Here, Colorado-Ute and the Members have demonstrated that the REA's policy has, in fact, changed. The REA's actions with respect to Wabash Valley Power Association, Inc. and Big Rivers Electric Corporation are clear examples of both direct and "inferred preemption."[2] The cloud that such actions have cast over the dividing line between state and federal authority to regulate rates of rural electric cooperatives operating in interstate commerce is now so substantial that this Court should reexamine *Arkansas Electric*.

Moreover, there is evidence in the record that the change in rate structure ordered by the PUC would seriously impair Colorado-Ute's ability to repay its debt under the REA mortgage. Under these circumstances, the PUC's ability to regulate Colorado-Ute is subject to limitation under the Constitution of the United States. If, as argued here, the PUC does not have the authority, consistent with constitutional limitations, to regulate Colorado-Ute, it is not important what the REA's position in this situation might be. The REA letters to Colorado-Ute upon which appellees so heavily rely are, therefore, not controlling on the larger question of the constitutional limits on state regulation raised above. Furthermore, those letters do not rule out REA intervention with the Colorado PUC.[3]

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[2] See Jurisdictional Statement at 12-14.

[3] The letter of November 14, 1988 specifically noted that "at such time as refund proceedings may be initiated, REA would consider making our views known to the Commission." See, Motion to Dismiss or Affirm filed by Shell Western E&P Inc. at A-4.

III.

COLORADO-UTE AND THE MEMBERS WERE DENIED DUE PROCESS BY BEING DENIED ACCESS TO CRITICAL PORTIONS OF THE WASP-82 PROGRAM.

It is noteworthy in connection with the WASP-82 issue, that although both SWEPI and Empire rely almost entirely on the PUC's own conclusions justifying its refusal to give Colorado-Ute the entire WASP-82 computer program, including the supporting documentation and the supporting data, the PUC itself apparently did not even feel comfortable using that as a justification for denial since it did not cite such conclusions in its Motion to Dismiss or Affirm.

While arguing so vigorously that Colorado-Ute and the Members had access to some of the computer-related information, the appellees conveniently ignore that without access to all of the requested information, the ability to adequately cross-examine staff witnesses and to impeach the results of the computer-generated study was severely impaired.[4] As noted in appellants' Jurisdictional Statement,[5] a PUC staff witness testified that it would take Colorado-Ute four months

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[4] Appellees rely heavily on the fact that Mr. Raymond Keith, a Colorado-Ute employee, testified that the information about the WASP-82 program provided to Colorado-Ute by the PUC staff was sufficient. It should be noted that Mr. Keith was called as a witness by the PUC and was not testifying on behalf of Colorado-Ute. His testimony is, therefore, not binding on Colorado-Ute.

[5] Jurisdictional Statement at 17.

to replicate his computer analysis if Colorado-Ute had access to all the program information but the PUC denied such full access.

Due process requires that Colorado-Ute and the Members have a meaningful opportunity to be heard. Without the information withheld by the PUC, that opportunity was rendered worthless. It must not be forgotten that the results of the PUC staff's use of the WASP-82 program, predicting benefits which "would" result from a change to a demand-energy rate, were critical to the PUC's ultimate decision.

Given the ever increasing use of computer-generated evidence in the courtroom, this issue is of the utmost significance and should be addressed by this Court in this case.

CONCLUSION

For these and the reasons set forth in the Jurisdictional Statement, this Court should note probable jurisdiction of this appeal.

Respectfully submitted,

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